NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

APR 8 2003

CATHY A. CATTERSON
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. RIGOBERTO FERNANDEZ-CASTILLO, Defendant - Appellant.	No. 01-30398 D.C. No. CR-00-00084-RFC MEMORANDUM*

Appeal from the United States District Court
for the District of Montana
Richard F. Cebull, District Judge, Presiding

Argued and Submitted October 8, 2002
Seattle, Washington

Before: FERGUSON, FISHER, and TALLMAN, Circuit Judges.

Appellant Rigoberto Fernandez-Castillo ("Fernandez") challenges his conviction of possession with intent to distribute methamphetamine in violation of 21 U.S.C. § 841(a)(1). Fernandez asserts his rights under the Speedy Trial Act, 18

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

U.S.C. § 3161, were violated and contends the district court erred in allowing testimony at trial of his prior bad acts. We affirm.[1]

I

The Speedy Trial Act requires the trial of a defendant to "commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court." 18 U.S.C. § 3161(c)(1). If required by the ends of justice, the court may grant a continuance and declare certain days excludable from the seventy-day Speedy Trial clock. Id. § 3161(h)(8)(A). In determining whether the ends of justice warrant delaying a trial, one factor the court must consider is whether the failure to grant a continuance would deny defense counsel "the reasonable time necessary for effective preparation." Id. § 3161(h)(8)(B)(iv).

On February 14, 2001, Fernandez moved for a continuance. The district court granted the continuance the next day, postponing the trial from February 27, 2001, until April 30, 2001. The court found the delay excludable under 18 U.S.C. § 3161(h)(8) and cited as its reason defense counsel's need for more time to adequately prepare for trial.

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[1] In a separate published opinion, we address Fernandez's argument that his car was stopped in violation of the Fourth Amendment.

The granting of this continuance effectively superseded the prior *sua sponte* one-day continuance, rendering it a nullity and implicitly finding as of February 14 that the "ends of justice" would be served by delaying the start of trial as Fernandez requested. Fernandez cannot claim he was prepared for trial on February 26 but not February 27. The Speedy Trial Act is a shield, not a sword. United States v. Shetty, 130 F.3d 1324, 1331 (9th Cir. 1997); see also United States v. Lewis, 980 F.2d 555, 562 (9th Cir. 1992) ("Where a defendant's own actions contribute to the need for an 'ends of justice' continuance under the [Speedy Trial Act] the defendant cannot complain that a continuance violates his or her speedy trial rights."). Fernandez received a timely trial when he was ready for it under the Speedy Trial Act.

II

The district court acted within its discretion and properly admitted the testimony of Jim and Patricia Rhone under our four-factor test used to determine the admissibility of evidence of prior bad acts under Fed. R. Evid. 404(b). See, e.g., United States v. Bibo-Rodriguez, 922 F.2d 1398, 1400 (9th Cir. 1991). The evidence adduced at trial tended to prove Fernandez's knowledge (that the methamphetamine was in his vehicle) and his intent (to distribute the drug). The district court properly considered the prejudicial impact of the evidence and

determined that it did not substantially outweigh the probative value. See Fed. R. Evid. 403.

AFFIRMED.